Identifying Legislative Intent

Kaneesha Johnson
University of North Carolina at Chapel Hill
kaneesha.johnson@unc.edu

Frank R. Baumgartner
University of North Carolina at Chapel Hill
frankb@unc.edu

Marty A. Davidson, II
University of Wisconsin at Madison
madavidson2@wisc.edu

Prepared for presentation at the Annual Meeting of the American Political Science Association
Boston, MA, September 3 – 6, 2026

Note: this is a chapter from a forthcoming book, *Working as Intended,* with the University of Chicago Press in Fall 2027.

On November 20th, 1897, 20 years after the end of the Reconstruction and two significant defeats in the North Carolina state elections, a group of men, under the leadership of Furnifold M. Simmons, North Carolina member of the U.S. House of Representatives from 1887 to 1889, gathered in Raleigh, North Carolina, to concoct a plan to regain White supremacy in the state. The effort was resoundingly successful and, as expressed by Simmons in a 1900 speech, "Negro rule in North Carolina has ceased and negro office-holding in North Carolina has practically stopped."[1] In the same speech, Simmons explained that a Constitutional Amendment, which required people to take a literacy test in order to vote, that was ratified in 1900, was designed to "disenfranchise the ignorant negro without disenfranchising the uneducated white man. This discrimination against the ignorant negro in favor of the uneducated white man we maintain is not violating either the statute or moral law, because it is not discrimination on account of 'race, color or previous condition,' but on account of well recognized and essential differences in the moral and intellectual attributes of the two races."[2] Of course, despite Simmons addendum, the passage of the 1900 Amendment clearly demonstrates a coordinated effort to legally restrict the Black vote, despite no mention of race in the Amendment. Such examples of racially restrictive laws from this era are common and well-documented, but we raise this example to highlight an important point.

When a law is written in a race-neutral manner, we may employ various strategies to understand its underlying racial intent. For some, understanding the context in which a law was passed can be enough evidence of racial intent. For example, knowing that Simmons and his associates waged a campaign against "Negro domination" and fought to reinstate White supremacy in North Carolina is evidence of the racial discriminatory intention of subsequent laws. For others, who may resist acknowledging this context, would need to hear it from the framer's mouth that there was a racialized intention. Naturally, it is not difficult to find a racialized legislative intent from laws made in 1900, a particularly ugly period in this country's history. Should we be so naïve as to believe that this is a practice left behind? Certainly, people no longer say it out loud; they may keep their racial motivations hidden. The goal of this Chapter is to lay out ways that we might find those hidden motivations.

In this Chapter, we detail the major themes and considerations surrounding intent that emerge from the courts and the legal and academic literatures and introduce some new ways to infer intent. As with most man-made systems, the criminal legal system is messy and dynamic. We do not attempt to present a grand theory that would help us precisely locate legislative intent under a given set of circumstances; to do so would run us into all kinds of mess. Instead, we simply enumerate several of the strategies that have been employed in this line of work and suggest some new ones moving forward.

A key element in our argument is to shift the conversation. Given what we know about American history, why would we expect those designing the criminal code to act without racialized conceptions of crime? As we will show below, many of the laws on the books were crafted when Jim Crow was the law of the land. Improper legislative intent is generally treated in the courts and in the academic literature as highly unlikely, something that it is reasonable to assume would happen only in rare and perhaps shameful moments in the distant past. Laws demonstrated to have been so motivated are automatically unconstitutional, as racially discriminatory intent runs afoul of the Fourteenth Amendment's guarantee of "equal protection of the laws." Perhaps because the stakes are high, or perhaps because it seems impolite to suggest it, or maybe because it's just too painful to contemplate, the literature on legislative intent seems to start with the assumption that "of course they don't" do that.

While it may seem impolite, impolitic, or just not nice to suggest it, we find little reason to believe that racial motivations would be left at the door when lawmakers consider legislation. We also eschew any assumptions that previously discovered aspects of discriminatory legislation have been rooted out. True enough the country has made meaningful steps toward eliminating racial codes, de jure housing segregation, educational segregation, and other shameful parts of our legal history, and we celebrate that progress. But, given what we noted in the previous chapters, for example the dramatic housing segregation that continues to separate the races, and does so in exactly the same ways as did the de jure housing segregation enforced by banks until the 1960s, is it reasonable to assume that legislators have not found various, legally acceptable, means to continue historic practices? We are not judges but people looking at the facts with our eyes open. Because we want to understand how politics, lawmaking, and law enforcement work, and the causes of the monumental differences in law enforcement activity in different geographic and demographic communities, we address this question head-on with no assumptions that lawmakers "just wouldn't do that." Perhaps they do.

We are not the first to attempt to prove legislative discriminatory intent or suggest the impact of racism in policy making. Scholars, legal advocates, and community organizers have all attempted such endeavors.[3] Political scientists David Bateman and collaborators conducted extensive analyses of lawmaking in the US Congress over many decades of policymaking, showing how the political power of Southern Democrats was cemented into the system by the one-party structure of the South before the 1980s. Their unified voice on issues affecting race relations had enormous policy implications across vast areas of the law. The Social Security Act of 1935 was designed to omit domestic workers and agricultural laborers, for example, omissions that had massive racial implications.[4] The law itself does not state the racial motivation or explicitly omit any racial group, but the bargaining position of Southern Democrats on this and many other pieces of legislation was that if large numbers of Black Americans were to benefit, a law would simply not pass. The results of this were sometimes racialized policy design, as in the Social Security example, and sometimes wide discretion for state officials to implement federal programs, allowing federal funds to flow, but with implementation in accordance with “local practices” which in the South were clearly racialized. This is one reason why so many federal programs involve financial transfers to the states, which implement the programs. Direct implementation of social service programs or educational services by the federal government were political non-starters. Rather, Southern Democrats insisted that each state must implement programs (in accordance with “local practice”), even those paid for with federal funds.[5]

Similarly, Richard Rothstein’s extensive analysis of housing policies makes clear the racialized intent encapsulated in federal housing policies, including that for veterans and the federal involvement in red-lining practices by accepting them when federal mortgage policies could easily have been designed to disallow such racially discriminatory practices.[6] Of course, legal scholar Michelle Alexander has critiqued the massive incarceration system in terms very much consistent with what we are arguing.[7] So, our point is not that we are the first to suggest racially discriminatory intent, far from it. Rather, we want to shift focus now from documenting disparities to exploring where they come from. Are they evidence of a system off its rails, or signs of a system working exactly as intended?

In the sections that follow, we discuss important components of criminal law relevant to our discussion and later analysis: Disparate impact, discriminatory intent, law enforcement discretion, privileged access to the legislative table, and policy feedback. Understanding the connections among these factors gives insight into why criminal laws were created, how criminal law is enforced, the outcomes of criminal laws, and the ability of lawmakers to amend or revise laws in the face of policy feedback showing how they are enforced. In subsequent chapters, we use a range of historical methods to uncover whether certain key areas of the North Carolina criminal code were intended to target a group of people from their moments of inception. But for this chapter, our goal is to set up the analysis by exploring the various ways to identify and understand discriminatory intent.

We should note from the outset that while the existing standards for proving legislative intent provide a useful starting point to understand how the state understands and measures the concept, we as social scientists exploring this topic need not restrict ourselves to the state's stance on these matters. In many cases, the state has developed these methods to invalidate, or make harder, the possibility to prove discriminatory intent. For example, in the same month that we were finalizing this book, the U.S. Supreme Court essentially gutted Section 2 of the 1965 Voting Rights Act.[8] Following the toothlessness of the 15th Amendment, Section 2 of the Voting Rights Act[9], adopted in 1982, adopted a "results test," which made it easier for to challenge discriminatory voting practices by sidestepping the requirement to prove intentional racial discrimination.

A Senate Committee on the Judiciary report accompanying the 1982 Voting Rights Act amendment noted that the "results test" allows a plaintiff to challenge the "structure or practice on the basis of objective factors, rather than making a determination about the motivations which lay behind its adoption or maintenance."[10] Those factors included, but were not limited to:

- A history of voting-related discrimination, the extent to which voting in the elections is radically polarized.
- The extent to which the state has used voting practices or procedures that enhance the opportunity for discrimination against the minority group.
- Exclusion of members of the minority group from candidate slating processes.

- The extent to which minority group members bear the effects of discrimination in education, employment, and health, which hinder their ability to participate effectively in the political process.
- The use of overt or subtle racial appeals in political campaigns.
- The extent to which members of the minority group have been elected to public office in the jurisdiction.
- Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

In plain language, the committee report stated that "[t]he amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation."[11]

In a spectacular contradiction to Congress's intent in 1982, the Court's majority opinion in *Louisiana v. Callais*, written by Justice Alito, noted, "the focus of [Section 2 of the VRA], must be enforcement of the Fifteenth Amendment's prohibition on *intentional* racial discrimination… impos[ing] liability only when the circumstances give rise to a strong inference that intentional discrimination occurred."[12] Under the Courts new interpretation, congressional maps can only be challenged when it is shown that there was explicit intentional racial discrimination. This bar is exceedingly difficult to pass.

As expressed in the dissenting opinion, written by Justice Kagan and joined by Justices Jackson and Sotomayor, "vote-dilution plaintiffs will have to show more than vote dilution: They will have to show, as well, race-based motive. Now, as then, that requirement will make success in their suits nearly impossible."[13] It may come as no surprise to the reader that we are regressing to legislative and legal standards that were in place before some of the country's most important civil rights legislation was enacted.

The state's view is increasingly moving toward the stance that, "there is no discrimination until proven otherwise," and various branches of government have made it exceedingly difficult to prove otherwise. Our approach is quite different. Instead of beginning with an assumption of no racism in law making, we assume that laws developed within a White-oriented institution reflect societal biases of the times. From this position, analysis of the historical record is held to vastly different standards. If one begins with the assumption that the law is racialized, then evidence of disparate outcomes would support that assumption. On the other side of the spectrum, if one begins from the belief that the law is completely race neutral in its intention, then the bar to prove discriminatory intent is high, even when disparate impact continues for decades and is well known to all informed observers.[14] In the sections that follow, we describe satisfactory methods of proving discriminatory intent depending on whether one holds the belief that institutional racism in the law is endemic or non-existent. Figure 2-1 provides a schematic illustration of the relationship between the assumption of systemic racism and the level of proof needed to confirm that assumption.

Figure 2-1.

Initial assumptions about the possibility of systemic racism	Level of proof needed to conclude racially discriminatory intent
Endemic	
	Observed disparities in everyday life
	Official inaction to rectify observed disparities
	Documented disparate impact through official statistics and research-based studies
	Official inaction to rectify disparities documented by official statistics and research-based studies
	Circumstantial evidence: Historical background, sequence of events, legislative or administrative history
	Direct evidence: Official statements, semantic content of the law
Virtually inexistent	

Those holding the belief that systemic racism is endemic, therefore at the top end of the scale in the first column, are going to need little proof to confirm what they believe to be true. Driving through neighborhoods and seeing how police surveil poor versus rich neighborhoods would probably be satisfactory as evidence of racially discriminatory intent. As you move along the spectrum, moving towards an assumption that systemic racism is virtually non-existent, the corresponding proof to confirm that racial discrimination is at play becomes increasingly stringent. People with this assumption would likely need concrete proof that the actors responsible for writing and passing a law made an explicit reference to racially discriminatory intent within the language of the law. In the sections that follow, we will walk through the different levels of proof provided in the right-hand column of Figure 2-1, beginning at official proof of disparate impact.

In presenting a continuum of starting points in Figure 2-1, we draw attention to the fact that one's starting point matters. What might be sufficient proof to document discriminatory intent to one might not be enough for another. This exercise also helps explain that there are two factors at play: The evidence and the ideological starting point. The evidence is far from the only thing that matters. Indeed, if the starting point is that "this could never happen" or that "racism has been eradicated in our country" then almost no evidence would be sufficient, save perhaps a secret recording of a law-makers unguarded self-incriminating remarks. Readers can decide for themselves which starting point makes the most sense, given our history.

Disparate Impact

Disparate impact is a legal term that refers to policies or actions that have an adverse effect on one group more than another. Disparate-impact liability had first been grappled with by the courts within the domain of employment law; from there it has rippled out to various areas of the law. Examples can be identified in housing discrimination through the Fair Housing Act, age discrimination through the Age Discrimination in Employment Act, lending discrimination through the Equal Credit Opportunity Act, disability discrimination through the Americans with Disabilities Act, and voting discrimination through the Voting Rights Act.[15] However, the courts have been resistant to apply the disparate-impact doctrine to social actions and criminal law.[16] For example, an employment exam might render one group ineligible for employment 20 percent of the time, whereas another group fails the test only 5 percent of the time: that would be a 4-to-1 disparity. Or a requirement that individuals post cash bond before trial may lead more of one group than of another to be unable to do so. Traffic stops might be more likely to involve Black than White drivers, or the searches that follow from those stops might be more likely to involve one race than another. Disparate impact can generally be measured precisely if statistics are collected and race is recorded. Note that disparate impact may result from laws that are racially neutral on their face: There is no racial language in the law, and they may or may not have been designed with discriminatory intent. Accordingly, the courts have issued various rulings in different circumstances regarding the inference of discriminatory intent from the demonstration of disparate impact.

In *Griggs v. Duke Power Co.* (1971), a case concerned with employment practices, the U.S. Supreme Court established a three-prong test for evaluating employment discrimination. First the plaintiff must establish adverse impact; second, if adverse impact is established, the employer must prove the policy is directly related to a business necessity; and third, if the employer meets the burden, the plaintiff can still win by proving there were less discriminatory alternatives. This means that employers may use tests, policies, and other procedures that have an adverse impact, but only the least adverse one possible given the job. Exams that bear no relation to the job duties, for example, cannot be used if they have an adverse impact on any class of applicant.

Since *Griggs*, the courts have been increasingly resistant to amend laws based on differences in outcomes alone and large swaths of the public have been hesitant to deem the criminal legal system as being built on racist foundations based on observed outcomes. Many people resisting these conclusions might point to a belief that racially disparate outcomes are likely due to the underlying behaviors of different groups, despite limited data showing such differences.[17] But, if one begins with the posture that laws are written in a racially discriminatory way, then the simple fact that the laws are applied in such a way would provide confirmation that the law is being applied in the way it was intended.

Despite the courts' growing rejection of disparate impact, it remains a popular topic of inquiry in social science literature. Scholars and advocates have uncovered the extent to which race, sex, class, and place have contributed to differences in outcomes of the criminal legal system.[18] Though there are differences in definitions of disparate impact within this body of work, we define disparate impact as an area of the law that results in an overrepresentation of a demographic group by 40 percent of is population share. Given the nature of law enforcement, it is highly unlikely to be able to classify a criminal law as either completely neutral or where enforcement is limited only to one demographic group.[19] Most likely, the impact of criminal laws falls somewhere between these two extremes. In fact, we found only one law on the books that appears to have a neutral effect across demographic groups: Failure to stop for a stopped bus (code 5428). Table 2-1 shows the percent of charges by race-sex groups for this specific charge compared to their demographic share for the 10,361 charges under this crime code.

Table 2-1. An Example of Equity: Failure to Stop for a Stopped Bus.

Race-Sex Group	Population (%)	Charges (%)	Ratio
White Female	32.2	30.6	0.95
White Male	30.8	33.4	1.08
Black Female	11.4	11.1	0.97
Black Male	10.0	10.8	1.08
Latine Male	4.9	5.12	1.04
Latine Female	4.5	4.0	0.89
Asian Female	1.5	0.8	0.53
Asian Male	1.4	0.7	0.50
Native Female	0.6	0.3	0.50
Native Male	0.6	0.3	0.50
Total	*98.0*	*97.1*	

Note: Population (%) and charges (%) do not total 100 due to missing race and sex observations.

For all the demographic groups with more than 4 percent of the population, the share of those arrested is within 10 percent of the share in the population. No other element of the criminal code has an impact as neutral as this crime code. Note that laws may have equal impact, slightly disparate impact, or highly disparate impact. Some examples of highly disparate-impact laws include the following (for a more complete list please refer to Tables 6-12 to 6-16 in Chapter 6):

- Failure to return rental property (code 2649), where Black females are 41 percent of those charged, but 11.4 percent of the population, a ratio of 3.6.
- Threatening phone calls (code 5338), where Native American males are 2.9 percent of those charged, but 0.6 percent of the population, a ratio of 4.8.
- School attendance law violation (code 3822), where White women are 48.8 percent of those charged, but 32.2 percent of the population, a ratio of 1.5

While there will naturally be some variation in the share of people who are arrested under any given law, it is striking that so few criminal codes are applied in a neutral manner. Why is this? Is it because failure to stop for a stopped bus is the only crime that people across race-sex demographic groups commit equally? Or is it that the safety of children in a school bus is so important that there is limited discretion from law enforcement? Many explanations offered by social scientists for why we observe disparate outcomes hinge on differences in behaviors of various demographic groups[20] the role of racism in law enforcement[21], policies and laws from specific time periods[22], and social environments.[23] In the chapters that follow, we offer an explanation rooted in racialized intention of the law itself. But first, we want to understand just how widespread disparate impact is: how many statutes on the books result in a disparate impact?

Origin Years of Disparate-impact Statutes

When the General Assembly creates a new law or amends and old one, the state's criminal code is updated to reflect the change; the code is in constant flux as new laws are passed, and old ones are repealed or amended. In each section of the criminal code, the date of passage of the related statute is listed. We gathered the origin year for every statute currently on the books; a total of

647 statutes, broken down into 1,084 sub-statute sections. Because we also know which statutes have disparate impacts, we can easily summarize when laws currently differentially affecting various demographic groups were passed. In 2-2 the bars indicate the year that each of the current statutes was passed and corresponds to the left axis. The solid line indicates the cumulative total of these laws and is measured on the right axis.[24]

Figure 2-2A. Origin years for all NC statutes

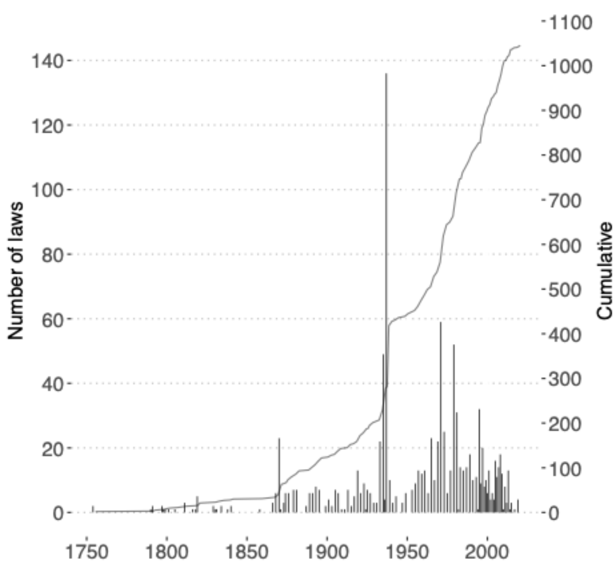
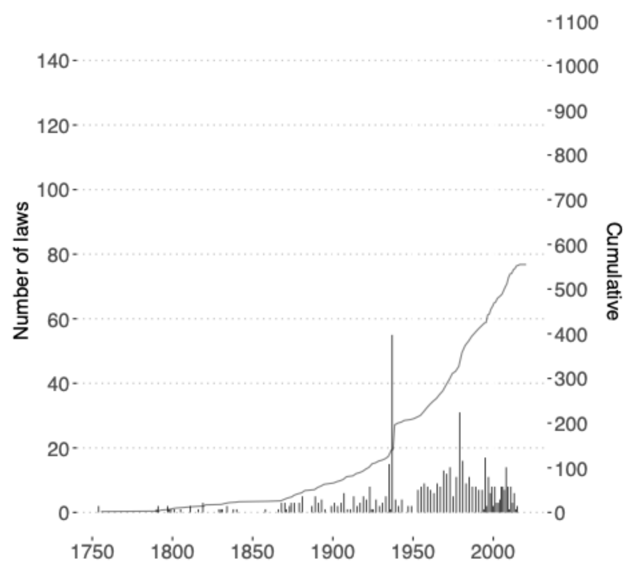


Figure 2-2B. Origin years for targeted statutes



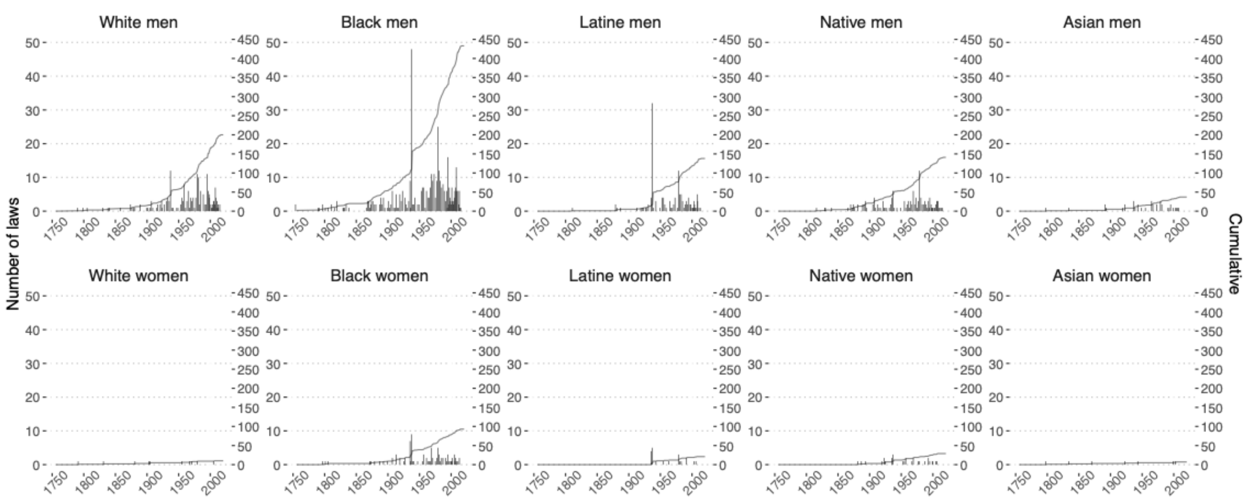
Two important caveats must be highlighted. First, as we only have access to the current criminal code, we do not have the origin years of all crimes that were put on the books across time. There are certainly a number of statutes that created crime codes that were, at some point, removed from the books. Second, we focus our attention to origin years of statutes that currently exist, rather than crime codes, as we cannot be sure that a crime code was created at the same time a statute was created.

Figure 2-2A shows the origin years for all statutes on the books, and Figure 2-2B shows the identifiable origin year for those statutes that result in disparate impact. Both parts of the

Figure show clear peaks and valleys indicating when all general statutes and disparate-impact statues were passed. Most notable are the spikes in the mid-1930s, the mid-1970s, and then in the mid-1990s and the late 2000s. We see three main takeaways: First, the Figure identifies very clear periods of heightened legislative activity in the domain of criminal law. Second, when sub-setting to the statutes that currently produce disparate impacts, there are very clear periods of time when those statutes were passed. Third, these are generally the same. That, when the legislature gets active in the criminal domain, we can expect racially disparate laws.

The trends displayed in Figure 2-2B are for disparate-impact statutes for any race-sex group. The various graphs presented in Figure 2-3 disaggregate the data by race-sex groups, showing the chronological trends in how many statutes were passed each year that had a disparate impact on that group, and on the right-hand axis, the cumulative of such laws over time. The y-axes is the same in each of the 10 panes of the Figure, making clear that there are few disparate-impact statutes affecting most demographic groups, no matter the time period.

Figure 2-3. Origin of disparate impact laws, by race-sex group



When looking at when current disparate-impact statutes were enacted by race-sex group, it is clearly not the case that statutes were passed randomly—there are very specific times when these statutes were created. This is particularly true when we look at Black and Latine groups. It is especially striking when looking at when Black men targeted statutes were passed: with very clear spikes in 1937 (48 statutes passed), 1979 (25 statutes passed), 1981 (12 statutes passed), 1995 (16 statutes passed), and 2008 (13 statutes passed). For Black women, the clearest spike is in 1935 and 1937 (9 and 7 statutes passed, respectively). Statutes passed in 1937 (32 statutes passed) and 1979 (12 statutes passed) currently have a disproportionate impact on Latine men. For Native men, there were 12 statutes passed that disproportionately target them today. We see no noticeable spikes for other race-sex groups.

Notice that the final number of the cumulative lines indicates the current number of statutes that disproportionately impact each respective group. For Black men, there are almost 450 statutes that disproportionately target them, which is more than double that of any other group. White men have roughly 200 disparate impact statutes, followed by Native men (roughly 150), Latine men (just under 150), and so on.

Identifying Discriminatory Intent

Following from the schema laid out in Figure 2-1 earlier in this chapter, we review a range of strategies that can be used to identify discriminatory intent. We move in the order of Figure 2-1 from those methodologies that might satisfy only some people to those that meet a much more stringent standard. We begin with an act of omission.

Inaction in the Face of Observed Disparate Impact

What happens when disparities are exposed through a journalistic expose, a court case, an academic study, or by a new piece of policy or advocacy research? Does the legislature take immediate action to remedy the situation? In a way, failure to take remedial action when disparate impacts are documented is perhaps the most telling demonstration of adverse legislative intent. For example, there is no mystery or surprise in the disparate impact adversely affecting Black people in the criminal legal system. Calls for reform or law enforcement abolition, demonstrations of unequal treatment, and reams of literature documenting these outcomes have been developed. State agencies routinely gather data to track the demographics of those affected by given policies, especially within the law. Occasionally, as when punishments for crack and powder cocaine were moved in the direction of greater equality (but not eliminated), we see legislative recognition of an unacceptable situation.

One recent example was the Task Force on Racial Equity in Criminal Justice (TREC), established by Governor Roy Cooper in June 2020, and co-chaired by Attorney General (now Governor) Josh Stein and Supreme Court Justice Anita Earls.[25] The Group's 2024 year-end report lists 125 recommendations for improvements to the criminal legal system ranging from "eliminate cash bail for Class I, II, and III misdemeanors unless risk to public safety" (#79) to "analyze and report on racial disparities in sentencing laws and recommend possible changes" (#115) and "prohibit capital punishment for people with serious mental ill ness and people 21 or younger" (#117), ending with recommendation #125: Establish the Commission for Racial Equity in the Criminal Justice System as a permanent, independent commission.[26] The executive order that established the Task Force expired on December 31, 2024, and it was disbanded. In spite of the Task Force's having been eliminated, NC Senate Leader Phil Berger targeted it in a news conference in September 2025 while promoting "Iryna's law," HB 306, which expanded the death penalty and mandated pre-trial detention for thousands of people accused of crimes: Berger said: "'That task force advanced weak-on-crime policies that kept the murderer on the streets,'... 'We cannot keep our citizens safe if our policies favor criminals over public safety.'"[27]

In sum, not only may the legislature ignore evidence that racial disparities are present in the implementation of laws, but they may not like the message and may take the very actions that are being cautioned against by those looking at the data and expressing alarm. When that is complete, they may shoot the messenger.

Some forms of disparate impact may be great, but perhaps truly not intended. For example, various traffic enforcement actions related to undocumented driving (e.g., driving without a valid driver's license and driving without proof of insurance) have strongly adverse effects in the Latine community, and in some cases local district attorneys have agreed not to prosecute these cases.[28] One question is whether the traffic laws from the 1930s that mandated having a driver's license or car insurance were designed on purpose with the intent to discriminate against the Latine population. We do not think this corresponds to the historical record, mostly due to the fact that the Latine community was such a small percentage of the North Carolina population in the 1930s. But the disparate impact of certain driving offenses against Latine people is a fact today.

In other examples, such as drug laws currently having disparate impacts on Black and White populations, it seems clear that the disparate impact was predictable at the time of the legislation and indeed that it was at least partially intended. We can look at whether the legislature acts when disparate impact is demonstrated to understand this better. We will dedicate Chapter 5 to this specific question.

We should be clear that disparate-impact litigation is fairly limited in criminal law, in part due to the 1987 Supreme Court case *McCleskey v. Kemp* (1987). McCleskey, a Black man, was convicted and given a death sentence after murdering a police officer. In a writ of habeas corpus, McCleskey argued that a statistical study proved that the imposition of a death sentence was in some part explained by the race of the victim and the accused. While the Supreme Court held that statistical evidence, absent evidence of purposeful discrimination, alone could not amount to a constitutional violation. The Court required direct evidence of discriminatory intent by a judicial actor: a judge, prosecutor, or police officer. Disparate impact alone was insufficient, the Court ruled; there must be evidence of unlawful discriminatory intent. Of course, this is virtually impossible to find, as it is rarely put on paper.

The Court's ruling in *McCleskey* is important on its own as it shut the door to disparate-impact claims in capital cases and more generally across the criminal legal system. Internal memos written by the Justices in the *McCleskey* case highlight some important elements of the Justices' thinking around disparate-impact claims broadly. First is the sentiment that if the Court allowed McCleskey to make a disparate-impact claim in death sentencing, then it would create a slippery slope that would allow disparate-impact claims throughout the entire criminal legal system. In a memo to file dated September 30th, 1986, Justice Powell wrote, "if similar statistics were produced, the rationale of McCleskey's argument would apply to all crimes" *(McCleskey v. Kemp*, n.d., p. 33)[29]. That is, the Justices feared that the precedent could go too far.

A second point illuminated by the *McCleskey* internal memos is that not only were the statistical claims of racial discrimination accepted, but that the racial discrimination in capital cases was unavoidable. Justice Antonin Scalia wrote as follows to the other Justices in anticipation of the final ruling:

> I plan to join Lewis's opinion in this case, with two reservations. I disagree with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue. And I do not share the view, implicit in the opinion, that an effect of racial factors upon sentencing, if it could only be shown by sufficiently strong statistical evidence, would require reversal. Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and

> ineradicable, I cannot honestly say that all I need is more proof. I expect to write separately to make these points, but not until I see the dissent (*McCleskey v. Kemp*, n.d., p. 147).[30]

Scalia's comments in the unpublished memorandum show an understanding that racial discrimination was both real and "ineradicable." Here, behind closed doors, and away from the observation of the public, members of the Court are not only acknowledging racial discrimination throughout the system, but accepting it.

It is rare to see an acknowledgement of widespread racial discrimination throughout the criminal legal system such as that of Justice Scalia. But when we see it followed by a statement that no action should be taken, then we should conclude that this qualifies as showing discriminatory intent. Justice Scalia may not have created the system, but he accepts it, even arguing that it cannot be avoided. In his discussion of *McCleskey*, attorney John Charles Boger referred this as "Grand Racial Avoidance" (2018), whereby the justices turned away "from the reality of widespread racial discrimination in Georgia's capital sentencing system and an acquiescence to Scalia's cynical perspective."[31]

The unpublished *McCleskey* memos highlight another important factor: that much of the reasoning that goes into making a decision regarding a law or policy is rarely made public. In those few instances that supporting documents are uncovered, it becomes clear that what is presented in the wording of the law does not always match the real motivations of the decision-maker. The *McCleskey* example was brought to light because Supreme Court Justice Powell was meticulous in his record keeping, and upon his death his papers were made public. But no such law exists that mandates Justices or legislators preserve their personal or legislative files. In North Carolina, as of 2023, legislators are considered custodians of their own files and can make decisions about what can and cannot be destroyed.[32] This is also the case for many other states across the country. As we have highlighted in this Chapter, many of the methods of proving discriminatory intent through direct evidence depend on having access to personal files or supporting documents of legislative action. It should also be worth highlighting that the nature of communication between officials has undergone drastic changes over the decades. Gone are the days when lawmakers communicated by handwritten letters that were stored away in filing systems. Instead, in the age of internet and smart phones, we are seeing government officials and law makers communicate via channels untraceable to the public. In a world where it is becoming increasingly difficult to gain access to these files where they do exist, one major addition to the list of proving legislative intent is inaction in the face of observed disparate impact.

Disparate-impact Litigation and its Backlash

In the same *McCleskey* ruling as just discussed, the Court noted that while it would not rule a law unconstitutional because of a statistical analysis, legislatures could do so. The majority ruling reads in part:

> Second, McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." … Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts,"[33]

Accordingly, states have sometimes provided statutory relief when statistical disparities can be documented, something we explore in later chapters.

The federal government led with respect to disparate-impact legislation, and the Courts accepted these laws, in the area of employment legislation and in the Voting Rights Act. In recognizing the detrimental effects of race-based discrimination in employment against Black people, highlighted by organizers, lawyers, and scholars during the civil rights movement, the federal courts allowed for litigation based on unequal treatment. Disparate-impact litigation was a tool developed by government agencies under the Civil Rights Act of 1964[34], reaffirmed under

Griggs v. Duke Power Company (1971), in which aptitude tests for internal promotions were ruled by the Supreme Court to be in violation of Title VII of the 1964 Civil Rights Act. The US Congress further solidified this with a provision in the Civil Rights Act of 1991 that set the standard of proving disparate impact. While the 1964 and 1991 Acts were targeted to employment discrimination, they serve as important examples of the willingness of the government to intervene and enact policies that counter harmful race-based practices of the past. In this instance, when the federal judicial branch was faced with evidence that hiring practices were resulting in the disparate impact against Black people, they instituted policies that would help counter this trend. Although there have since been several attempts to reel in this protection[35], disparate-impact litigation remained a valuable tool for racial equity in employment practices for decades. The 1965 Voting Rights Act is another example where statistical analyses of detrimental treatment of Black voters were ruled enough to cause relief.

Of course, in 2025 and 2026 many of these ideas are under attack. On April 23rd, 2025, Donald Trump signed an executive order "Restoring Equality of Opportunity and Meritocracy," which attempts to eliminate the ability to bring about disparate impact discrimination litigation. Racial preferences in college admissions have been eliminated, and the Supreme Court held hearings in October 2025 on whether race should be eliminated as a consideration in Voting Rights Act cases, potentially affecting legislative districts throughout the South. (In May 2026 its ruling did indeed render such districts illegal, going back to a discriminatory-intent standard outlined in *McCleskey*, not the disparate-impact standard from in the Voting Rights Act.) All these actions are part of a larger movement to eradicate many of the protections against racial discrimination that have been developed over the past six decades. The executive order begins with words that acknowledge, and accept, disparate outcomes in no uncertain terms, "[a] bedrock principle of the United States is that all citizens are treated equally under the law. This principle guarantees equality of opportunity, not equal outcomes."[36] The executive order goes on to note that disparate-impact litigation is one of the tools used in a "pernicious movement" that "endangers this foundational principle."[37]

In sum, disparate impact has been seen as a first step in an effort to eradicate it unless it can be shown not to derive from pernicious intent. Now, government authorities are attempting to eliminate it from consideration even when it may be overwhelming.

Circumstantial Evidence

A more widely accepted, but more difficult, standard for demonstrating intent is the use of circumstantial evidence. Such examples include the specific sequencing of events leading to a law or policy, historical background of the decision, departure from normal procedure, the relevant legislative or administrative history, and a consistent pattern of actions from decision-makers that impose a greater harm to a protected class of people. If a disparate impact can be documented, and linked to such evidence, then one may be able to infer the intent of the legislature. This standard requires not the smoking gun of a discriminatory statement caught on the record, but rather is inferred by other elements of the historical record. A key legal case here is *Arlington Heights*.[38] The decision directs the courts and agencies to consider the totality of the circumstances or a cumulative assessment of the evidence at hand. An example of such an approach is seen in *North Carolina State Conference of the NAACP v. McCrory* (2016), a successful challenge to North Carolina's voter ID law. In this law, the NAACP argument that the intent of the law was to disenfranchise Black voters in violation of the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965, and the evidence included a number of factors, none of which alone may have been sufficient to prove intent, but which, taken together, did. In striking down the district court's decision, the Fourth Circuit stated that "th[e] error resulted from the court's consideration of each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by *Arlington Heights*."[39] Here is a summary of how the courts have allowed circumstantial evidence.

Historical Background

Examining the historical context of a law or policy can be one method to show circumstantial evidence of discriminatory intent. Under this method, if one can show a history of the state engaging in discriminatory actions to target a protected group, including the creation of laws to target a specific group, repealing protections for groups, and other official actions, even if those actions are written in a neutral manner, then a case can be made for discriminatory intent.

For example, in *North Carolina State Conference of the NAACP v. McCrory*, the court considered "North Carolina's history of race discrimination and recent patterns of official discrimination, combined with the racial polarization of politics in the state" particularly relevant in determining discriminatory intent in Senate Bill 824, which required voters to provide one of ten authorized photo IDs to vote in state elections. The court found "the record is replete with evidence of instances since the 1980s in which the North Carolina legislature has attempted to dilute the voting rights of African Americans."[40]

The court considered the long history of efforts to disenfranchise African Americans in North Carolina, including the 1899 Act to Regulate Elections, literacy tests, poll taxes, accusations of Black voters engaging in fraudulent practices, and gerrymandering. The court, convinced by this history, found that "a series of official actions taken for invidious purposes," and held that the district court "erred in ignoring or minimizing these facts."[41]

The Sequence of Events Leading to the Decision

Another method of proving discriminatory intent hinges on the sequencing of events that lead to a legislative decision. Under this method, the motivations of an official, or officials, can be deduced by examining whether there is a pattern of discrimination leading up to the policy or law in question. Unlike historical background, which considers a wide range of factors contributing to the collective history and often spanning a much longer time period, the sequencing of events method tends to be confined to the actions leading up to a specific piece of legislation.

In *North Carolina State Conference of the NAACP v. McCrory* the Fourth Circuit noted that the sequence of events leading to H.B. 589, including "the General Assembly's eagerness to at the historic moment of *Shelby County's* issuance, rush through the legislative process the most restrictive voting law North Carolina has ever seen since the era of Jim Crow," as persuasive evidence of the General Assembly's discriminatory intent.[42] In other words, timing matters.

Legislative or Administrative History

As outlined in *Arlington Heights*, courts can also consider the legislative or administrative history in proving discriminatory intent. The examination of legislative or administrative history requires the examination of the documents and proceedings that take place during the creation of a law. Such documents include congressional committee reports, legislative debates, committee hearings, and earlier versions of the bill. These documents are critical to understanding what was being considered when debating and drafting legislation.

Using the NC voter ID case again as an example, the record revealed that the General Assembly had requested a report on voting patterns by racial groups in the state which revealed the provisions outlined in the proposed legislation would disproportionately target Black people. The court held:

> This data revealed that African Americans disproportionately used early voting, same-day registration, and out-of-precinct voting, and disproportionately lacked DMV-issued ID … In sum, relying on this racial data, the General Assembly enacted legislation restricting all — and only — practices disproportionately used by African Americans. When juxtaposed against the unpersuasive non-racial explanations the State proffered for the specific choices it made … we cannot ignore the choices the General Assembly made with this data in hand.[43]

Statistical Evidence of Discriminatory Effect Alone is Generally Insufficient

The courts have been particularly wary of allowing disparate-impact claims alone to prove discriminatory intent or violations of the Eight Amendment. The standard in *McCleskey* remains: disparate impact alone is not enough. But there have been times when disparate impact, combined with elements of the historical record, have been enough for the courts to accept an argument about impermissible discriminatory intent. The *Arlington Heights* standard, therefore, was not contradicted by *McClesksey*. In *Arlington Heights*, the Court held that, while evidence of disparate impact could be used as a component in establishing discriminatory intent, it could not prove intent without further supporting evidence. With sufficient circumstantial evidence combined with documented adverse effect, then it is enough.

Direct Evidence

A final, but very difficult standard for the demonstration of discriminatory intent is to find explicit racially discriminating statements in the text of a law or racially offensive ones in the legislative history. For those who are the most skeptical about the possibility of racial animus playing a part in the legislative process, or for those most adverse to findings in favor of those disadvantaged by the system, this is the preferred standard. This is also the position that the courts are increasingly adopting in 2025 and 2026. There have been two primary ways for establishing clear and stated discriminatory intent, both falling under the wider umbrella of direct evidence.

Direct evidence of discriminatory intent is direct proof of the fact. Direct evidence includes evidence that, "if believed, proves the fact [of discriminatory animus] without inference or presumption."[44] The clearest forms of direct evidence are express classifications, which include the semantic content of a law or an official admitting to having considered race as a basis for their action. Other examples of direct evidence of discrimination include "any statement or document which shows on its face that an improper criterion served as the basis—not necessarily the sole basis, but a basis—for an adverse action [is] direct evidence of discrimination."[45]

Official Statements

Another direct method that has commonly been used in the courts to prove discriminatory intent is examining the official statements from an official responsible for state action. Under this method, discriminatory intent can be established if the official makes a statement to another person that signals the action will be used improperly against a group of people. One such example of this is found in *Cooper v. Harris*, a 2017 North Carolina racial gerrymandering case where the Court identified statements on the North Carolina Senate floor made by legislators responsible for the map making, stating the maps "must include a sufficient number of African-Americans" in the challenged district.[46]

Semantic Content and Plain Meaning of the Words

Perhaps the most straightforward of the methods to go about proving direct evidence of discriminatory intent is the plain meaning of the words of the text or the semantic content, described by legal scholar Lawrence B. Solum as "the semantic context of a legal text is simply the linguistic meaning of the text."[47] This method simply states that a law is discriminatory if the law states, in the plain meaning of the words and definitions at the time of passage,[48] that it should be applied differentially to groups according to race, ethnicity, or religion. While the logic of relying on the meaning of the words makes intuitive sense, it is unlikely to yield successful attempts given that laws are not written to explicitly mention race anymore. In some cases, the courts have been sensitive to the specific use of vocabulary that may signal specific groups, rather than explicitly mentioning a racial group.[49] For many, the fact that Jim Crow laws are no longer applied and legislation is no longer written with explicit reference to identified racial groups are sufficient proof that discrimination occurs no more. We are not in this group. However, the idea that "racism is a problem of the past" or that Americans have "moved past race" is an important driver for some political and judicial actors.

The US Supreme Court came close to this view in its 2023 ruling ending affirmative action in college admissions. The Court referred to its own previous ruling on the same topic from 20 years before, which included these words:

> Finally, race-conscious admissions policies must be limited in time. The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[50]

In *Students for Fair Admissions*, the Court ruled:

> Twenty years have passed since *Grutter*, with no end to race-based college admissions in sight. But the Court has permitted race-based college admissions only within the confines of narrow restrictions: such admissions programs must comply with strict scrutiny, may never use race as a stereotype or negative, and must—at some point—end. Respondents' admissions systems fail each of these criteria and must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.[51]

If racism is a thing of the past, then remedies for those who suffer from it are no longer appropriate, needed, or justified. Increasingly, explicit reference to race, meaning to consider race as a way to address past discrimination against Black and other Americans of minority backgrounds, is taken as "plain meaning" to indicate racial discrimination against White or other

Americans who have been traditionally advantaged. Plain meaning of the words is a difficult standard on which to build a basis for addressing past discrimination against minorities.

Direct evidence of discriminatory intent in the form of explicitly identity-based laws or public or recorded statements by decision-makers expressing a racially discriminatory intent are relatively rare in our current age, for obvious reasons.

Using Policy Feedback to Understand Legislative Intent

The levels of proof of racially discriminatory intent that we have just reviewed are, by design, focused on the actions of the legislature at the time of consideration or passage of a given law. But the law is constantly in flux. Laws are routinely amended, added, or removed from the criminal code as new information comes to light, new social developments emerge, and as lobbyists and advocates vie for policy influence. As we discussed in the previous section, the Voting Rights Act of 1965 serves as an example where the state observed a past injustice and sought to remedy it. In that instance, we can see a victory by a large social movement which pushed for a correction to decades of previous adverse disparate impact. By legislative action, they won important victories that allowed them to use statistical evidence of disparities, given the history of racialized gerrymandering and hostility to Black political power in the South. This allowed them to avoid the need to document discriminatory intent by finding inadvertent slip-ups in the record or other "smoking gun" demonstrations of racial hostility. (That is, until the US Supreme Court reversed this ruling in 2026.) In other cases, things could go in the other direction: the political exploitation of voters' concern with crime generates ample opportunities for authorities to reinforce policies that may already be known to generate racial inequalities, as various "tough-on-crime" policies are known to do.[52]

No matter which side might win any particular policy battle, this oscillation between policy implementation, observing outcomes, and amending or creating new policies, is known in the social sciences as policy feedback.[53] By its nature, policy feedback is dynamic, where our discussion of intent thus far has been static. The dynamic nature of legislative intent requires us to consider some additional factors at play in the law-making process. The first concerns which voices are present at the legislative bargaining table. The second considers how the law is implemented by law enforcement after the law has been passed: law enforcement discretion.

Privileged Access to the Legislative Bargaining Table

When new laws are being considered and debated, a range of people beyond elected legislators may be at the table. In many ways, this makes sense. When creating laws or policies, it is a wise decision to have input from the key stakeholders and experts in the area of the law being created or revised. For example, if traffic legislation is being considered, it would make sense to involve legislators, urban planners, local residents, highway or transportation engineers, advocacy groups, law enforcement, social scientists who can help anticipate any potential disparate impacts, or other issues that may arise in the implementation of the law. Having a diverse group at the table with different viewpoints, and a process that weighs the various voices in a meaningful way, would help in crafting legislation that not only centers public safety but also helps anticipate possible disparate impacts or other problems before they occur. However, if there is systematic exclusion of some voices and an overreliance on others, then legislation is likely to be skewed toward the preferences of those at the table. These concerns give meaning to the general adage: "If you're not at the table, then you are probably on the menu."[54]

As we will show in later chapters, law enforcement representatives are routinely included at the table of people creating criminal legislation, whereas local residents and advocacy groups representing marginalized groups are routinely excluded. This privileged access to the legislative table results in placing higher value on law enforcement perspectives, which stresses the role of criminal law in solving societal problems, and excludes perspectives that place community needs or preventative steps at the forefront.

When considering whether disparate impacts are intended or unintended, it is helpful to consider who is at the table, and why that group was invited. As marginalized social groups are often targeted for adverse legislation, one question is whether those at the negotiating table understand the likely impact of a piece of legislation. If they do not, they could make inadvertent errors. To the extent that the bargaining table includes a wide variety of voices, this possibility is lessened. Or, those who may be adversely affected by the proposed rule may make their voices heard during the legislative process and the law may be enacted over their objections and in spite of their warnings of its adverse impact. We will come back to this issue in later chapters.

Another key issue in assessing legislative intent is the legislative response to later demonstrations of adverse impact. Where a law was inadvertently written in such a manner as to generate a disparate impact, and the lawmakers had no such intention, then they might rectify the situation in a later legislative session, even years later. Where the disparity is pointed out to them and they take no action, then we must conclude that they are at worst accepting of the disparity or at best comfortable with the outcome.

Law Enforcement Discretion

For legislative intent to be actualized, the law needs to be enforced as the law makers intended. Depending on how the laws are written, in particular how precise its language is, enforcement of the law will involve various levels of law enforcement discretion. Broadly speaking, law enforcement discretion can be defined as the power of the police to make a choice. Early understandings of police discretion held that discretion could only occur when the officer was acting outside of the norms or rules of the agency.[55] Later definitions of police discretion have posited that law enforcement officers, and law enforcement agencies, have discretion when "the effective limits on his power leave him free to make a choice among possible courses of action or inaction."[56] One element of law enforcement discretion relates to the vastly different levels of surveillance that different individuals undergo (see Chapter 7). If the police are absent, they will not be able to observe crime. If the police are routinely present, odds of arrest are higher. A second element of discretion involves what the police do when they observe a certain behavior. Most drivers speed, and, even when an officer observes this, the officer opts not to pull them over. Police discretion involves both these aspects.

Research on police discretion has shown that there are various factors that influence law enforcement decisions. Some of these factors are legally relevant, such as jurisdiction and seriousness of the crime, and some are not, such as race and the neighborhood where actions occur. Most of the work in this book so far has presented the non-legal factors that contribute to police discretion, such as race, geography, and the sex of a person. Exploring police discretion in this way assumes that discretion comes only at the point of the law enforcement decision. While this is likely the case in some areas of the law, if the state passes a law that is intended to result in disparate impact, then there necessarily must be an understanding that the law will be applied in such a way. Law enforcement discretion can, in some ways, be dependent on how the law is written, who it is written by, and the expectations of how it should be enforced. Judges, prosecutors, defense attorneys, police officials, and sheriffs are typically consulted during the legislative process and have ample access to decision-makers, many of whom are former law enforcement officials themselves. For example, the current Governor of North Carolina, Josh Stein, served for eight years as Attorney General, as did the governor before him, Roy Cooper. It is reasonable to expect that policymakers enacting new laws have good understandings of how police may implement these new laws, and we will show specific examples in the chapters to come of where laws were specifically written with the expectation of differential enforcement.

We do not mean to imply that the existence of discretion is evidence of discriminatory intent. There are certainly instances where less discretion could also lead to disparate outcomes. But if there was an intention on the part of the legislature for the law to target a certain group, then they need to ensure that police can enforce it in the intended way (we will provide examples of this collaboration and cooperation in later chapters). In the past, the legislature was allowed to write laws in a way that would target certain groups. For example, during antebellum slavery, a slave revolt was commonly defined as three or more enslaved people organized with the intent of achieving personal or group freedom. Or, later in 1854, the NC General Assembly passed a law stating that, "[a]ssault of a white woman by a person of color with the intent to commit rape is punishable by death."[57] Here, there is a strict racial boundary with little discretion needed for law enforcement to target the law along racial lines. As we entered a period of "color blind" and broadly written laws that rendered most actions criminal (for example defining a riot as "a public disturbance involving an assemblage of three or more persons"—an interesting parallel to the definition of a slave rebellion) law enforcement had to be offered a significant amount of discretion to enforce the law in a way that reflected the discriminatory intent. Given the history of policing in our country (and the analysis of it we provided in Chapter 7), it seems reasonable to assume that members of the state legislature would know how police discretion could be expected to operate.

Ambiguous Language

One way in which law enforcement is granted discretion is through ambiguity in the language of the law. Ambiguity within the law typically refers to scenarios where there is a lack of clarity in the wording of the law or where there is uncertainty in the application of a term.[58] Ambiguity is usually raised as an issue in contract law, where there is a need for the court to intervene to settle disputes on the meaning of the terms of a contract. Ambiguity in criminal law arises when a criminal statute is unclear or ambiguous. The vagueness doctrine, also called the void-for-vagueness doctrine, which has been hailed as "among the most important guarantees of liberty under law"[59], is a constitutional requirement that a State cannot take away life, liberty, or property under a law that fails to "give a person of ordinary intelligence adequate notice of what conduct is prohibited" or lacks "sufficient standards to prevent arbitrary and discriminatory conduct."[60]

The vagueness doctrine also limits the arbitrary enforcement of the law.[61] If a criminal law is deemed too vague or obscure for the average person to understand then the law is void. Another remedy to vagueness is the rule of lenity, which holds that if a law is unclear or ambiguous, then the court should apply it in a way that favors the defendant. Though once a useful tool in the courts, the rule of lenity has largely fallen out of practice.[62]

In spite of legal scholars' assertions that ambiguity equals invalidity, vague laws are common, as are laws that are rarely enforced. When ambiguous laws grant broad discretion to police, this can lead to an increased likelihood of disparate outcomes either because it allows individual officers to act on underlying prejudice, implicit biases, or systemically biased institutional practices.[63] Further, as we will explore later, it allows the law to be implemented in preconceived discriminatory ways. An example of ambiguous language of the law is criminal code 4401 defined as "imped[ing] traffic by slow speed," which states:

> [n]o person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law; provided, this provision shall not

> apply to farm tractors and other motor vehicles operating at reasonable speeds for the type and nature of such vehicles[64]

According to the text of this law, there is no defined speed limit that a driver would clearly be in violation of the law. Instead, it is down to the police officer to decide if the speed is too slow. We found 821 charges for driving too slowly in our database; unsurprisingly, Black men account for almost 24 percent of these charges, despite being just 10 percent of the North Carolina population. Similarly, Latine men account for around 5 percent of the population yet are close to 18 percent of these charges. These two groups are therefore over-represented by large shares; the vagueness of the law may be what allows this disparity to emerge, since the observing officer can choose whether or not to apply the law after they see who is engaging in the behavior.

Another example is the aggravating circumstance in death penalty litigation of homicides deemed to be "especially heinous, atrocious, or cruel," "vile," "horribly inhuman," or "depraved," which, when found, can lead to more severe sentencing for a defendant. Unlike other aggravating circumstances, such as robbery or having a victim who is a member of law enforcement (both of which are easily verifiable based on objective standards), these ambiguous standards offer no clear line. With no clear line, District Attorneys may seek death in some cases but not in others, leading to differences in how the standard is applied state to state, over time, and, possibly, based on the identity of those involved in the crime.[65]

Of course, absolute clarity in all legislative texts may not be possible, and perhaps is not desirable, for a variety of reasons. But where objective standards are replaced by subjective ones, or where police or prosecutors have wide leeway in deciding whether or not to enforce a law, the legislature has opened the gates to possible disparate treatment based on identity.

Broad Language

Related to, but distinct from, ambiguous language are criminal laws that are written so broadly that they essentially deem every action illegal and therefore give law enforcement discretion in deciding whom to arrest. This is not a new concept within the legal world. The term overbreadth is used within constitutional law to describe a statute that reaches far beyond the subject matter it was originally intended to regulate.

A recent example of a law being struck down because of overbreadth is *United States v. Alvarez (2012)* and the Stolen Valor Act. In 2007, Xavier Alvarez was invited to give remarks at the Walnut Valley Water District Board of Directors. At the meeting, he stated that he was a retired marine and during his service was awarded the Congressional Medal of Honor. Both statements were false, and Mr. Alvarez was charged with two counts under the Stolen Valor Act of 2005, which makes it a crime to falsely claim receipt of military declarations or medals. The United States Supreme Court held that the Stolen Valor Act violated the Free Speech Clause of the First Amendment because Congress drafted the Act too broadly and attempted to limit speech that could cause no harm.

Borrowing from this legal standard, we propose that another way of thinking of overly broad laws is those that are written in such a way that renders almost every action criminal, thus granting police huge discretion in whom to target. An example of a North Carolina criminal law that fits into this category is criminal code 4454 (failure to stop at a stop sign). Of course, there certainly may be a select few among us who do comply with every road law, but it is much more likely the case that we have all, at some point, not come to a complete stop at a stop sign. Indeed, some observational studies have shown that the majority of drivers do not come to a complete stop at stop signs.[66] By deeming most drivers in violation of a criminal law, it is then down to the discretion of the police of whom to charge. Like ambiguous laws, overly broad laws can lead to disparate outcomes. Of the 38,354 charges in our database for failure to stop at a stop sign, 32 percent were against Black men despite being just 10 percent of the population.

Of course, overly broad laws abound throughout the criminal legal system.[67] The traffic code is replete with laws that are routinely broken. Despite common belief, speeding does not have a "buffer zone" under which one is not breaking the law if one is only slightly over the speed limit. Therefore, on a routine basis, virtually every driver is speeding. If they are not, they may be found in violation of laws that prohibit driving behaviors such as "impeding traffic by slow speed" (code 4401), "unsafe movement" (4458), "improper turn" (4447), or any number of other traffic or vehicle codes. The traffic code is by no means the only area in which routine behaviors are criminalized but rarely enforced. Trespassing, sleeping in a public park, having an open container of alcohol, jaywalking, carelessness with fire, littering, failing to have dog tags or a dog on a leash, making excessive noise after a certain time at night, and many other behaviors we may see in everyday life are generally prohibited by law. While these laws are on the books, they are rarely enforced. Of course, having the laws on the books allows the police to enforce them when the situation calls for it, for example if a dog is routinely left off lead and bites the neighbors, or if a teenage party gets out of hand and becomes a nuisance to the neighbors. But when laws are routinely broken, but no enforcement action follows, it becomes clear that the police may be able to pick and choose when to enforce them. More importantly, they can pick and choose against whom to enforce them.

On the other side of the spectrum are laws that are written with such specificity that they strictly limit when the law can be enforced. For example, NCGS 14-12.12 states that it is a crime to "place a burning or flaming cross on property of another or on public street or highway or on any public space." The wording of NCGS 14-12.12 is highly specific, and it is not hard to imagine what would constitute a violation of this law, the only discretion granted to law enforcement is whether to charge and arrest a person or not. Our point is not that laws are generally too broad or ambiguous; it is that some are narrow and clear, and others are not, and that this may be a sign of discriminatory intent.

A Simple Question

In this Chapter we pose a simple question: why wouldn't lawmakers have racially discriminatory intent? While the question is simple, the ramifications have a seismic impact in how we go about evaluating the racialized intent of the criminal code. In Figure 2-1 we highlight that the starting point of one's view on whether systemic racism is endemic or virtually inexistent shapes how much proof is needed to show racially discriminatory intent. We recognize that not everyone will agree where we fall along this continuum, and our goal is not to convince the reader where we should fall. All that matters for our conversation is a recognition that the starting point matters.

The Courts, and the State in general, has typically fallen somewhere to toward the "virtually inexistent" end of the scale, with brief moments inching slightly toward the endemic side. Therefore, they will only be swayed by direct evidence of racial intent. But we, as social scientists and regular people, need not confine ourselves to this end of the belief system. We can accept a wider and more expansive range of methods.

In the chapters that follow, we select areas of the criminal code and examine the intent of the legislatures when either enacting new criminal laws or reforming existing ones. We use the range of methodological techniques that we have outlined in this Chapter to explore the origins of anti-Klan laws, anti-protest laws, gang laws, laws for certain types of drugs, capital punishment, reforms in structured sentencing, and the traffic code. In our historical examination, we show that the creation of criminal law by the legislature, at least in the areas of the law that we examine, are done with the motivation to both target racial groups and to control behaviors that they associate with that group. For the purposes of this paper, we provide the example of the differing responses to two racialized drug crises; the crack cocaine epidemic and the opioid epidemic, to demonstrate that when the legislature decides to intervene to alter the distributed burdens of the criminal legal system is indicative of racialized legislative intent.

The Legislative Response to Two Differing Drug Crises

Few areas of the law have received as much attention as laws relating to drugs. Laws relating to drugs of all kinds have been put under intense scrutiny for both its widespread consequences and the racialized implementation. The War on Drugs, waged by President Richard Nixon in 1971, has been singled out as one of the main drivers of mass incarceration and the striking over-representation of Black people in the criminal legal system.[68] The origins of marijuana laws have been linked to anti-Mexican sentiment.[69] The Harrison Narcotics Act of 1914, which regulated and taxed the importation, production, and distribution of opiates, attributed the use of opium to increased sexual relations between White women and Chinese users of the drug.[70] From the turn of the 20th century, drug use was linked with “alien” or “immigrant” cultures associated with the Chinese, Mexican, and of course Black people as well.[71]

Although there is evidence to suggest that drug use does not differ very dramatically across racial and ethnic groups (see SAMHSA for data on drug use by group),[72] arrest rates do not follow this underlying pattern of supposed drug usage. Using the AOC database, we provide a breakdown of the percent of arrests for cocaine, marijuana, meth, and opioids (which includes both heroin and other opiate variants) by race. We include only those charges that fall under a category where we can identify the specific drug associated with that charge. (This means that we omit here offenses that are defined as violations of the Controlled Substances Act where the violation is listed as relating to Schedule 1 through 5, since these include multiple types of drugs; Schedule 6 is included since that refers only to marijuana.) Many offense codes specifically refer to heroin or opioids, cocaine, meth, or marijuana, however, and these are all included. (The fact that the criminal code provides separate enumerations depending on the particular drugs, even among those with the same levels of addictive power, suggests that the legislature has long been very specific in associating certain drugs with certain punishment; some are punished more harshly than others.) We provide the racial breakdown of identifiable drug charges in Figure 5-1. To make an easy comparison to the share of the population, the bar on the far right of the graph provides the percent of the population by race. We also provide the total number of charges for each drug type in parentheses under the drug type on the x-axis label.

Figure 5-1. Drug arrests by drug type and race

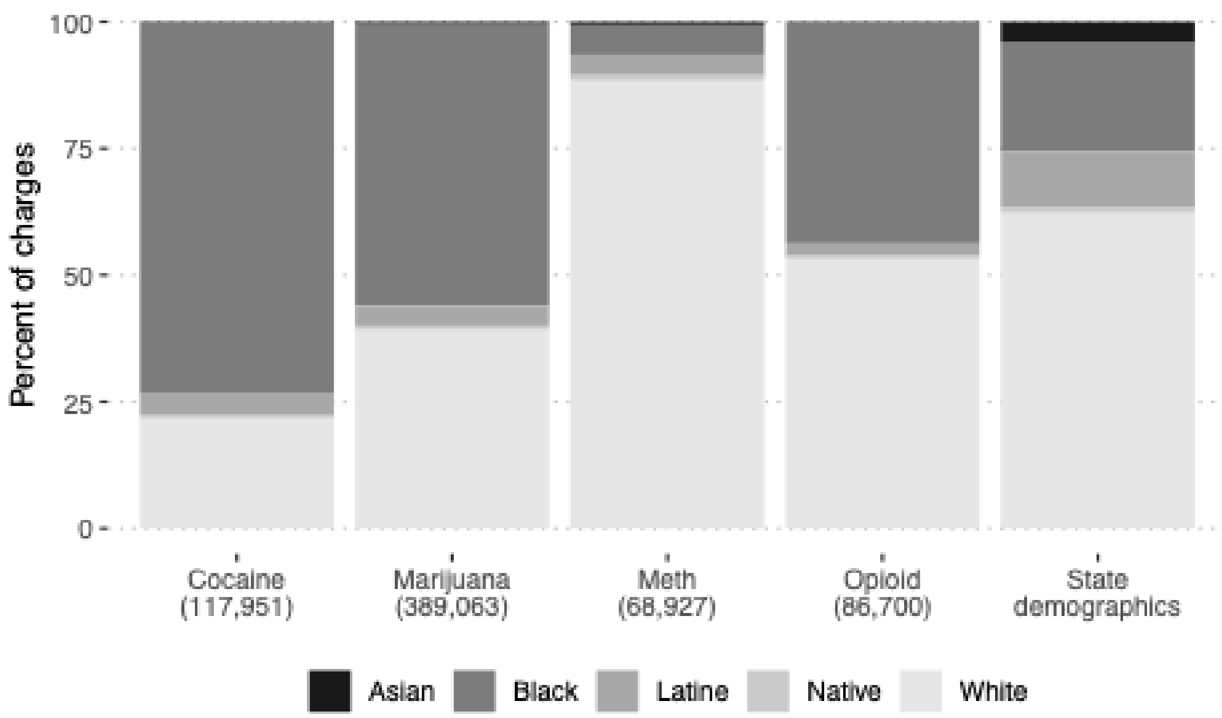


Figure 5-1 documents striking differences in who is arrested for crimes according to the type of drug in question. Black people are overwhelming the group accounting for the largest share of arrests for cocaine and marijuana, whereas White people are the racial group with the greatest share of charges for meth and opioids, with rates roughly equal to or greater than their demographic share. We should note that the categories that we present do not allow for a distinction among drugs falling under the same umbrella. For example, we cannot know the difference in charge rate for people found in possession of heroin or fentanyl, or for crack versus powder cocaine, both of which are important distinctions. Nevertheless, the most important point that we wish to highlight remains that arrest rates across racial groups are very different based on the type of drug in question. The racial disparities of criminal charges and general drug use are well known to law enforcement and elected officials not only through documentation in arrest and incarceration data, but also in reports by federal and state agencies. The next question becomes, knowing these differences, does the legislature respond with a remedy to the underlying problem or do they continue with a punitive "solution"?

Though we have focused most of our historical analyses on the explicitly racial considerations that factor into the creation of criminal law, we would be remiss to not highlight the role of class, especially as we enter the terrain of the establishment and reform of drug laws. Not only is it important to consider the role of race in shaping which behaviors should and should not be criminalized, the social class of a group is also highly determinant of the treatment and empathy that is extended to a group. As previous researcher has highlighted, one of the reasons for the harsher sentencing of users of crack cocaine versus powder cocaine (federally at a ratio of 100-to-1) was the perception of crack cocaine as being used by predominantly Black people and powder cocaine perceived as being used by predominantly White people.[73] Similar comparisons can be made for drug use among poorer and more affluent groups. In the following sections we tease out the differences in legislators' reactions to different drug crises

The Legislative Response to the Opioid Epidemic

In the early 2000s North Carolina, like much of the country, was faced with the rise in the use of opioids and the number of people dying from opioid-related deaths. The opioid epidemic has been roughly divided into three waves, beginning with the first wave witnessing an increased prescribing of opioids in the 1990s, the second wave showed as an increase in overdose deaths from the street drug heroin from 2010, and the third beginning in 2013 with a substantial increase in overdose deaths involving synthetic opioids. The third wave of the opioid crisis saw an interesting departure from previous legislative responses to drug enforcement. Instead of a "tough on crime" response, as was typical in previous attempts to curtail drug use including the legislative reaction to the use of meth as previously discussed, opioid addiction was seen as a health emergency with no one more culpable in than the greedy pharmaceutical executives associated with "big Pharma." While we are certainly not the first to highlight the discrepancies in the legislative response to the opioid epidemic, as opposed to the rise in use of other drugs that have documentation of higher use in other racial groups[74], we focus on North Carolina's legislative response to the opioid crisis specifically to show how quick the state was to reverse course for a drug crisis that was framed as a problem facing the White community, and especially those who may come from a more affluent background.

Evidence of the Disparate Racial Impact of the Opioid Crisis and Legislative Action

In response to the increasing rates of uses of opioid related deaths in North Carolina, in 2002 the Injury and Violence Prevention Branch in the Division of Public Heath of the North Carolina Department of Health and Human Services (DHHS) released a report on the preliminary findings of drug usage and deaths from overdoses in the State. Based on this report, DHHS Secretary Carmen Hooker Odom created the Task Force to Prevent Deaths from Unintentional Drug overdoses. The report, addressed to Secretary Odom and Attorney General Roy Cooper, included the number of deaths by overdoses by race, finding that in 2001 just over 83 percent of all deaths were White people.[75] Interestingly, the report found that most deaths stemmed from cocaine usage; however, as we will describe in the next section, there was no comparable urgent rush to correct cocaine addiction.

To highlight the growing concern of the opioid epidemic, in 2010s the Department of Health and Human Services began publishing data on unintentional opioid-involved overdose deaths. These short documents include the opioid-involved deaths by county, with the highest rates in the more rural western and eastern counties, the type of opioid used, and the demographics of those dying from opioid use. Although there are some differences in age categories (with people between 25 and 34 having slightly higher rates of deaths), the burden is overwhelmingly experienced by White people. According to the 2017 and 2018 reports, almost 90 percent of those with unintentional opioid-involved overdoses were White people.[76]

It is clear, then, that the legislature was well aware of the racial differences in drug use and overdose deaths. The language used to reference people struggling with opioid addiction, which are largely White individuals, in reports from legislative bodies show a stark contrast to people with addictions to other drugs, as demonstrated by language on the main webpage of Attorney General Jeff Jackson, "[i]t is critical that we aggressively pursue the dealers and traffickers who push heroin on people with opioid addictions… Someone who has a substance use disorder has a chronic illness. Jail is not the best way to treat addiction."[77]

Considering this information, the State Legislature quickly moved to pass a series of laws that addressed opioid use stressing the need for prevention and treatment over punitive actions. The first was the Strengthen Opioid Misuse Prevention (STOP) Act, which aimed to reduce the number of people becoming addicted to opioids by requiring medicine prescribers to follow a set of guidelines, including setting a five-day limit for prescription of drugs for acute pain, required prescribers to check databases to prevent doctor-shopping, and added a requirement for electronic prescribing. The Synthetic Opioid Control Act (2017) helped law enforcement target traffickers of the drug, which typically comes from outside of the country, by making all derivatives of the drug classified as a controlled substance under state law. In 2018, the Legislature passed the Heroin and Opioid Prevention and Enforcement (HOPE) Act, which gave tools to law enforcement to more effectively target the trafficking of fentanyl, protecting patient safety, and increasing funding for drug treatment and recovery services.

In 2019, then Attorney General, Josh Stein, in collaboration with the NC Department of Health and Human Services Secretary Many Cohen, two insurance provider executives, and a coalition of public and private partners launched the public education campaign “More Powerful NC,” to “prevent and confront opioid addiction by empowering people to fight against addiction in the communities.”[78]

When the Legislature Chose Not to Act: Cocaine

The opioid epidemic was, of course, not the first time that North Carolinians was suffering with addiction. As we previously noted, a report to the legislature in 2004 revealed that there were more deaths stemming from cocaine related overdoses than from opioids, yet there was no response to view this as a health crisis. As the reader may be aware, the criminalization of cocaine usage has historically been influenced by racial factors. In the early 1900s, medical journals and news reports alleged that Black men on cocaine developed a superpower and resistance to fatal wounds and would become intensely violent.

In 1914, Edward Huntington Williams, a reputable medical doctor, railroad executive, and philanthropist, authored an article appearing in the *New York Times* entitled, "Negro Cocaine "Fiends" Are A New Southern Menace," which describes in great detail how Black men would turn murderous after taking the drug. Williams noted that the reason why Black people were using cocaine in such high rates is because of their propensity to be addicts in the first place. Williams highlights that Black people tended to also be alcoholics, and one way that southern states, including North Carolina, dealt with this problem was to "pass laws intended to abolish the saloon and keep whiskey and the negro separated."[79] This limited access to alcohol, Williams argued, was what led the Black person to cocaine usage. Williams notes that while there is drug addiction across all races, "the negro drug "fiend" uses cocaine almost exclusively."[80] The doctor goes on to describe that the Black people in the South are more likely to use the drug because, "[m]ost of the negroes are poor, illiterate, and shiftless."[81] Black men using cocaine, he argued, lead to "fantastic hallucinations and delusions that characterize acute mania"[82], "a temporary immunity to shock—a resistance to the "knock down" effects of fatal wounds"[83], and that Black cocaine users acquire "deadly" accuracy in their gun shooting abilities, as evidenced by the case of the "cocaine nigger" in Asheville, N.C., who "dropped five men in dead in their tracks, using only one cartridge for each."[84]

The racialization and fabricated hysteria around the Black cocaine user only continued to intensify. The 1970s was an important period in the racial double standard of drug usage and sentencing.[85] The portrayal of Black drug users pushed the narrative of the drug fiend, whereas White drug usage, especially among youth, was seen as experimentation and, in wealthier circles, a common staple in social settings.[86] The crack cocaine epidemic that hit the United States in the 1980s had an overwhelming impact on the Black community and was a large driver of the extreme racial disparities in drug sentencing.[87] An examination of legislative documents within North Carolina reveals that the state was likely well aware of the rising use of cocaine, and the reported racial differences of its usage.

A 1993 report entitled, "Health Status of Blacks in North Carolina," outlined the racial differences in cocaine use in state, "[a] variety of sample surveys in North Carolina reveal high Black prevalences of … substance use (cocaine and marijuana)."[88] The same report notes that a study that tested the urine of people delivering babies in ten of the state's largest hospitals found that "[c]ompared to Whites, nonwhite women were over 30 times as likely to test positive for cocaine and 61 percent more likely to test positive for marijuana."[89] Another report published in 1997 by the North Carolina Department of Crime Control and Public Safety (NCDCCPS) of the Governors Crime Commission highlights the rising use of both heroin and cocaine in the late 1900s, "[t]he trend of heroin and cocaine usage rising during the 1980s and 1990s."[90]

In addition to official reports, news coverage of crack cocaine usage portrayed the user as Black. An article, authored by a medical doctor, appearing in *The Charlotte Post* described this trend in very clear terms, with a particular emphasis on the use among Black women:

> Data from the National Institute on Drug Abuse suggests that the intensity of cocaine abuse among blacks causes adverse health consequences disproportionate to their representation in the general population… The young black cocaine user is likely to use the drug occasionally and be a frequent user of alcohol or marijuana. Cocaine use among black women is increasing and is often connected with issues of sexuality and relationships with men[91]

The framing of Black women as being one of the primary users of cocaine, particularly as it relates to their sexuality, was a common trope used to justify the support and passage of punitive policies that directly impact Black women. As Professor of Political Science Ange-Marie Hancock describes[92], the disgust that is invoked in framing certain subgroups of people, in Hancock's example Black women who receive public assistance welfare, can bolster support for anti-democratic policies. The same, then, can be said for the invoking of the lascivious "Jezebel," a trope that began during slavery, to ignite support for punitive measure to curb the uncontrollable Black woman.

Despite the knowledge of the increasing use of crack cocaine during this period, law makers and enforcers across the country adopted a punitive stance toward users of the drug, as opposed to preventative measures to address addiction. North Carolina was no different in this regard. Following federal legislation, North Carolina passed the Controlled Substances Act in 1971, which created a scheduling system for illegal drugs. In the following decades, punishments for drugs in general, but cocaine in particular, were ratcheted up. Throughout the 1980s, there were various bills introduced to make possession of cocaine a felony in the state. In 1989, the state made it a felony to possess any amount of cocaine (it had previously been one gram). As we noted in the previous section, in 2004 the legislature was again presented with evidence that cocaine use was prevalent in the state, with most overdose deaths stemming from the drug. As far as we can tell, there was no action taken at all to remedy this situation.

In highlighting the different legislative response to drug usage facing different racial groups, we do not wish to imply that a more punitive stance should have been taken to address increasing drug use among White North Carolinians. Instead, we use these examples to show that the legislature has it within their power to act very quickly to remedy a problem through non-punitive measures. Why then, did the legislature not take the same approach when faced with a problem of apparent increased cocaine use among Black North Carolinians? The logical conclusion that we have reached is that the legislature, when presented with evidence of a significant problem facing Black people of their state, simply did not see it as a big enough problem to do anything about it. Their inaction was a signal that they were perfectly comfortable with these inequalities to persist.

---

[1] Furnifold M. Simmons, "Chairman F.M. Simmons' Speech," *The News and Observer*, April 12, 1900. P. 7
[2] Simmons, "Chairman F.M. Simmons' Speech."
[3] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New Press, 2010); Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (Liveright Publishing Corporation, 2017).
[4] For an in-depth discussion on race, class, and the establishment of the 1935 Social Security Act, see Chapter 2 of Robert C. Lieberman 1964-, *Shifting the Color Line : Race and the American Welfare State* (Harvard University Press, 1998).
[5] David A. Bateman et al., *Southern Nation: Congress and White Supremacy after Reconstruction* (Princeton University Press, 2018).
[6] Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*.
[7] Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.
[8] Louisiana v. Callais, No. 24-109 (U.S. Supreme Court April 29, 2026).
[9] Gabriel J. Chin, "Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?," *Georgetown Law Journal* (Washington) 92, no. 2 (2004): 259–316, 231470791, pp. 259–316, eLibrary; ProQuest Central.
[10] *Report of the Committee on the Judiciary United States Senate on S. 1992 with Additional, Minority, and Supplemental Views*, No. 97-417 (97th Congress, 1982), https://www.documentcloud.org/documents/23689943-senate-judiciary-committee-report-on-the-voting-rights-act-amendments-of-1982-senate-report-no-97-417/. (p. 31).
[11] *Report of the Committee on the Judiciary United States Senate on S. 1992 with Additional, Minority, and Supplemental Views*. (p. 27).
[12] *Louisiana v. Callais*. (p. 23).
[13] *Louisiana v. Callais*. (pp. 23-24).
[14] Those who fall into the camp of "systemic racism is non-existent," are more likely to believe that differences in criminal charging stem from differences in behaviors by group.
[15] A. Tiwari, "Disparate-Impact Liability for Policing," *The Yale Law Journal* 129, no. 1 (2019): 252–306.
[16] Owen Fiss, "The Accumulation of Disadvantages," *California Law Review* 106 (2019): 1945–76.
[17] A. R. Piquero and R. W. Brame, "Assessing the Race-Crime and Ethnicity-Crime Relationship in a Sample of Serious Adolescent Delinquents," *Crime and Delinquency* 54, no. 3 (2008): 390–422.
[18] For an introduction to this literature see Alexes Harris, *A Pound of Flesh : Monetary Sanctions as Punishment for the Poor* (Russell Sage Foundation, 2016); Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*; Elizabeth Hinton, *From the War on Poverty to the War on Crime : The Making of Mass Incarceration in America* (Harvard University Press, 2016); Andrew Gelman et al., "An Analysis of the New York City Police Department's 'Stop-and-Frisk' Policy in the Context of Claims of Racial Bias," *Journal of the American Statistical Association* 102, no. 479 (2007): 813–23, https://doi.org/10.1198/016214506000001040; Kristin Henning, *The Rage of Innocence : How America Criminalizes Black Youth* (Pantheon Books, 2021).
[19] Note, however, that some laws such as those regulating people with uterus' reproductive choices may lead to the arrest only of people with a uterus, by definition. As the criminal legal system only categorizes men and women, most of these people would be categorized as "women" in the data.
[20] C. T. Harris et al., "Are Blacks and Hispanics Disproportionately Incarcerated Relative to Their Arrests? Racial and Ethnic Disproportionality Between Arrest and Incarceration," *Race and Social Problems* 1 (2009): 187–99; A. Blumstein, "On the Racial Disproportionality of United States' Prison Populations," *Journal of Criminal Law and Criminology* 73, no. 3 (1982): 1259–81.
[21] M. Romero, "Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community," *Critical Sociology* 32, no. 2 (2006): 447–73.

[22] J. Fellner, "Race, Drugs, and Law Enforcement in the United States," *Stanford Law and Policy Review* 20, no. 2 (2009): 257–92.
[23] R. D. Crutchfield et al., "Racial Disparity in Police Contacts," *Race and Justice* 2, no. 3 (2012): 179–202.
[24] The AOC database includes individuals arrested under 559 separate chapters and sections of the code; 38 statutes did not have an origin year listed, 23 have been repealed, 14 had no date listed, and two are broadly defined as local ordinances. So Figure 7-3 is based on the remaining set of laws.
[25] "Task Force for Racial Equity in Criminal Justice (TREC)," NC Department of Justice, accessed May 20, 2026, https://ncdoj.gov/trec/.
[26] NC Department of Public Safety, *2024 YEAR-END REPORT Task Force For Racial Equity in Criminal Justice* (NC Department of Public Safety, n.d.), https://ncdoj.gov/trec/reports/. (pp. 47-49).
[27] Kerri Carswell, "NC Legislative Leaders Target Cooper-Era Task Force over Bail Policies," *Carolina Journal* 17 (September 2025), https://www.carolinajournal.com/nc-legislative-leaders-target-cooper-era-task-force-over-bail-policies/.
[28] As part of a license restoration program, Durham County District Attorney Roger Echols piloted an initiative to dismiss fines and fees associated with low-level traffic tickets. Durham District Attorney Santana Deberry transformed the initiative into the Durham Expunction and Restoration Program (DEAR).
[29] As quoted in J. C. Boger, "McCleskey v. Kemp: Field Notes from 1977-1991," *Northwestern University Law Review* 112, no. 6 (2018): 1637–88.
[30]As quoted in Boger, "McCleskey v. Kemp: Field Notes from 1977-1991."
[31] Boger, "McCleskey v. Kemp: Field Notes from 1977-1991." (p. 1680). Prof. Boger, former Dean of the UNC Law School, was the attorney who argued for McCleskey in the Supreme Court.
[32] (Section 27.9.(a) G.S. 121-5). For a survey of state laws and collecting policies within state archives regarding the collecting of state legislators' papers see Brian Keough et al., "Public or Private? Reconsidering Ownership and Value of State Legislators' Papers," *Archival Issues* 35, no. 1 (2013): 21–36, https://doi.org/10.31274/archivalissues.10990.
[33] McCleskey v. Kemp, 418 US 279 (U.S. Supreme Court 1987). (p. 319, internal citations omitted)
[34] O. C. Johnson, "The Agency Roots of Disparate Impact," *Harvard Civil Rights-Civil Liberties Law Review* 125 (2014): 125–54.
[35] Johnson, "The Agency Roots of Disparate Impact."
[36] Restoring Equality of Opportunity and Meritocracy, EO 142281 (2025), https://www.whitehouse.gov/presidential-actions/2025/04/restoring-equality-of-opportunity-and-meritocracy/.
[37] Restoring Equality of Opportunity and Meritocracy.
[38] Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (U.S. Supreme Court 1977).
[39] N.C. State Conference v. McCrory, No. 16-1468 (4th Circuit 2016).
[40] *N.C. State Conference v. McCrory*. (p. 33).
[41] *N.C. State Conference v. McCrory*. (p. 31)
[42] *N.C. State Conference v. McCrory*. (p. 229)
[43] *N.C. State Conference v. McCrory*. (p. 48a).
[44] James W. Coghlan v. American Seafoods Company LLC, 413 F.3d 1090 (9th Circuit 2005). (p. 1095)
[45] Fabela v. Socorro Independent School District, 329 F.3d 409, 415 (5th Circuit 2003).
[46] A. Z. Huq, "What Is Discriminatory Intent?," *Cornell Law Review* 103, no. 5 (2018): 1211–92.
[47] L. B. Solum, "The Interpretation-Construction Distinction," *Georgetown University Law Center* 27, no. 95 (2010): 95–118. (p. 98)
[48] Caminetti v. United States, 242 U.S. 470 (U.S. Supreme Court 1917).
[49] Huq, "What Is Discriminatory Intent?"
[50] Grutter v. Bollinger, 539 U.S. 306 (U.S. Supreme Court 2003). (pp. 309-310).
[51] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, No. 20-1199 (U.S. Supreme Court 2003). (p. 6)
[52] For an example of this see Vesla Weaver, "Frontlash: Race and the Development of Punitive Crime Policy," *Studies in American Policial Development* 21, no. 2 (2007): 230–65.
[53] Policy feedback scholars have focused on the ways in which "policies make politics, " focusing on the tight connections between policies, their implementation, their effects on society, and further political developments generating further policy change, often in the same direction as the first movement. Key citations in this literature include Theodore Lowi, *End of Liberalism*, 1969.

[54] See the works of Dara Strolovitch, who demonstrates persuasively that even including organizations that purport to represent the interests of marginalized communities is likely to be insufficient, since the internal operating procedures of even such groups paradoxically privileges the voices of the most advantaged members of the group. See Dara Z. Strolovitch, "Do Interest Groups Represent the Disadvantaged? Advocacy at the Intersections of Race, Class, and Gender," *The Journal of Politics* 68, no. 4 (2006): 894–910; Dara Z. Strolovitch, *Affirmative Advocacy: Race, Class, and Gender in Interest Group Politics* (University of Chicago Press, 2008).
[55] T. Sellin, "Culture Conflict and Crime," *American Journal of Sociology* 44, no. 1 (1938): 97–103.
[56] K. C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969). (p. 4).
[57] North Carolina General Statutes, 40 § 10.
[58] S. Schane, "Ambiguity and Misunderstanding in the Law," *Thomas Jefferson Law Review* 25, no. 1 (2002): 167–94.
[59] C. R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, 2018).
[60] *(Manning v. Caldwell for City of Roanoke 2019, Carolina Youth Action Project v. Wilson*, 2023).
[61] A. E. Goldsmith, "The Void-for-Vagueness Doctrine in the Supreme Court, Revisited," *American Journal of Criminal Law* 30 (2003): 279–313.
[62] Z. Price, "The Rule of Lenity as a Rule of Structure," *Fordham Law Review* 72 (2004): 2004.
[63] J. Glaser, "Disrupting the Effects of Implicit Bias: The Case of Discretion and Policing," *Daedalus* 153, no. 1 (2024): 151–73; A. Charbonneau and J. Glaser, "Suspicion and Discretion in Policing: How Laws and Policies Contribute to Inequity," *University of California Irvine Law Review* 11, no. 5 (2021): 1327–48.
[64] North Carolina General Statute, § 20-141(h).
[65] M. Welner et al., "The Depravity Standard I: An Introduction," *Journal of Criminal Justice* 55 (March 2018): 1–11.
[66] M. Woldeamanuel, "Stopping Behavior of Drivers at Stop-Controlled Intersections: Compositional and Contextual Analysis," *Journal of the Transportation Research Forum* 51, no. 3 (2012): 109–23.
[67] Harvey Silvergate, *Three Felonies A Day: How the Feds Target the Innocent* (Encounter Books, 2011).
[68] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New Press, 2010); Vesla Weaver, "Frontlash: Race and the Development of Punitive Crime Policy," *Studies in American Policial Development* 21, no. 2 (2007): 230–65; Heather Schoenfeld, "The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States," *Journal of Gender, Race, and Justice* 15, no. 2 (2012): 315–52.
[69] Isaac Campos, *Home Grown Marijuana and the Origins of Mexico's War on Drugs* (The University of North Carolina Press, 2013).
[70] Steven A. Ramirez and adre douglas pond cummings, "The Racist Roots of the War on Drugs and the Myth of Equal Protection for People of Color," *The Racist Roots of the War on Drugs and the Myth of Equal Protection for People of Color* 44, no. 4 (2022): 453–90.
[71] David F. Musto, *The American Disease: Origins of Narcotic Control*, 3rd ed. (Oxford University Press, 1999).
[72] SAMHSA is the Substance Abuse and Mental Health Services Administration, part of the US Department of Health and Human Services. Its website provides ample data on drug use and addition patterns by racial group: https://www.samhsa.gov/.
[73] LaJuna Davis, "Rock, Powder, Sentencing-Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing," *Journal of Gender, Race and Justice* 14, no. 2 (2011): 375–404.
[74] Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.
[75] NCDHHS, "Findings and Recommendations of the Task Force to Prevent Deaths from Unintentional Drug Overdoses in North Carolina, 2003," unpublished manuscript, 2004.
[76] NCDHHS, *Opioid-Involved Poisonings* (2017); NCDHHS, *Opioid-Involved Overdoses, 2018* (North Carolina Department of Health and Human Services, 2018).
[77] NCDOJ, "Opioid Crisis," https://ncdoj.gov/responding-to-crime/opioid-epidemic/.
[78] Attorney General Jeff Jackson, "More Powerful NC: A Coalition to Educate, Engage, and Empower North Carolinians to Confront the Opioid Epidemic," *April* 4 (2019).
[79] Edward Huntington Williams, "Negro Cocaine," *Fiends" Are A New Southern Menace." The New York Times, February* 8 (1914), p. 60.
[80] Williams, "Negro Cocaine Fiends 'Are A New Southern Menace.'" (p. 60).
[81] Williams, "Negro Cocaine Fiends 'Are A New Southern Menace.'" (p. 60).
[82] Williams, "Negro Cocaine Fiends 'Are A New Southern Menace.'" (p. 60).
[83] Williams, "Negro Cocaine Fiends 'Are A New Southern Menace.'" (p. 60).
[84] Williams, "Negro Cocaine Fiends 'Are A New Southern Menace.'" (p. 60).

[85] Donovan X. Ramsey, *When Crack Was King : A People's History of a Misunderstood Era* (Random House Publishing, 2023).
[86] Ramsey, *When Crack Was King : A People's History of a Misunderstood Era*.
[87] United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Government Printing Office, 1995).
[88] Kathryn B. Surles et al., *Health Status of Blacks in North Carolina* (CHES Studies, 1993). (p. 29).
[89] Surles et al., *Health Status of Blacks in North Carolina*.
[90] NCDCCPS, "Components of Crime and Justice. Raleigh, NC: North Carolina Department of Crime Control and Public Safety," unpublished manuscript, 1997. (p. 4).
[91] Williams, "Negro Cocaine Fiends 'Are A New Southern Menace.'" (p. 9).
[92] Ange-Marie Hancock, *The Politics of Disgust : The Public Identity of the Welfare Queen* (New York University Press, 2004).